FILED
7/18/2017 4:28 PM
Court of Appeals
Division II
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NO. 49844-8-II

JOHN CHOQUER, a married man, as his sole and separate property,

Appellant,

vs.

GUY WAY AND ZENAIDA WAY, husband and wife,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CLARK

APPELLANT CHOQUER'S REPLY BRIEF

JOHN CHOQUER, Plaintiff Pro se
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A. Introduction

RCW 61.24.030 contains a numerical list of requirements that must be met for a trustee's sale to be lawful. The failure to fulfill any item on the list results in invalidation of the sale. *Schroeder v. Excelsior Management Grp., LLC,* 177 Wn.2d 94, 106-107 (2013). RCW 61.24.030(2), one of the items on the list, prohibits the non-judicial sale of agricultural land. Agricultural land must be sold judicially.

Statues that create liens generally are in derogation of the common law and must be strictly construed. *Viewcrest Condo Ass'n v. Robertson*, 197 Wn. App. 334, 338 (2016); *Tsutakawa v. Kumamoto,* 53 Wash, 231, 236, 101 P. 869 (1909). The Washington Deeds of Trust Act ("DTA") is a lien- creating statute. It must be strictly construed. *Lyons v. US Bank, NA*, 181 Wn.2d 775, 791 (2014). Additionally, the DTA and the DOT itself must be strictly construed in favor of the borrower. The reasons for these requirements are simple, but are sometimes overlooked by the courts.

Prior to the creation of DOT's, when mortgages were still the dominant real estate security instrument, relatively unsophisticated borrowers could rely on the judiciary to prevent lender's – who make it their business to utilize highly-skilled lawyers to take full advantage, fair or unfair,[1] of the non-judicial foreclosure process -- eager to foreclose from overreaching.

[1] Unfair advantage is what has happened in this case. Appellant invested 13 years in the property, sweating and toiling to realize his dream of a vineyard that would produce the

Statutes that allow foreclosure under a power of sale clause contained in a deed of trust ("DOT") are strictly construed against the exercise of that power[2] because, compared to *mortgage* foreclosure requirements, DTA procedures make it far easier for lender's to forefeit the borrower's interest in the real property that secures a loan. The DTA also revokes the right of redemption after sale guaranteed by a mortgage foreclosure (RCW 61.24.050); deprives the borrower of the right to an upset price (RCW 61.12.060); and eliminates the homestead right. *Felton v. Citzens Fed. Sav. & Loan Ass'n,* 101 Wn.2d 416, 679 P.2d 928 (1984). These losses of borrower rights should not be compounded by liberal construction of the DTA for the benefit of lenders.

Since the judiciary is not involved in DOT foreclosures, only the words of the DTA stand between the borrower and a lender that is eager to foreclose. Unless this court – and all other Washington courts -- strictly construes the DTA, the DTA's protections are meaningless, and borrowers are left at the mercy of banks, too many of which are merciless.

B. The sale of Appellant's property violated RCW 61.24.030(2) and was therefore void.

1. Respondents' use of 61.24.030(2) is deceitful.

John Choquer ("Appellant") executed a DOT that contains the following clause: "You covenant that the Property is not used principally

highest quality wines for Washington residents and people throughout the world. He built the property up until he had more than $400,000 in equity and then learned the bank had sold the $22,000 second mortgage on the property to an eager buyer for less than $26,000. The buyer received an unconscionable windfall. Appellant is still paying the much larger first mortgage on the property. The first mortgage is current.

[2] 3A N. Singer, *Statutory Construction* § 69.04 (4th ed. 1986).

for agricultural or farm purposes." *Respondents' Reply Brief ("Reply"),* at 6. In essence, Guy and Zunaida Way (collectively "Respondents") argue that by executing the DOT, Appellant waived the right to assert the property is *agricultural land* and therefore is prohibited from arguing the property may not be foreclosed non-judicially. *Id.*

If the language quoted in the preceding paragraph was the only language in the first sentence of RCW 61.24.030(2), Respondents' argument might be correct. But it is not the only language in the first sentence. Here is how the full first sentence of RCW 61.24.030(2) reads:

> That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; *provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially.*

(emphasis added).

Respondents' incomplete quote (and the argument based on that quote) is, at best, patently misleading, and at worst a purposeful attempt to deceive the court. The statutory language omitted by Respondents – the *italicized* portion of the quote immediately above – is the portion of RCW 61.24.030(2) that most directly addresses the issue raised by Appellant's appeal. The omitted language is part of the same sentence from which Respondents drew their misleading quote. Appellant can conclude only that the omitted language was intentionally omitted because Respondents, having observed and walked the property, know Appellant's property was

agricultural land on the date the DOT was granted and on the date of the trustee's sale.

RCW 61.24.030(2) was violated, and therefore the sale was void.

2. Appellant's claim that the land is agricultural land is, as a matter of law, unopposed.

Respondents assert that: Appellant is prohibited by RCW 61.24.030(2) from claiming the property is agricultural land; Appellant's declaration claiming the land is agricultural is self-serving; Appellant's use of the Open Space Taxation Agreement fails to provide any evidence that the property was ever designated as agricultural land; and the trial court ruled the land is not agricultural land. What Respondents never in their Reply is claim the property is not agricultural land.

They declare RCW 61.24.030(2) prevents Appellant from claiming the property is agricultural land because Appellant executed the DOT. If Respondents' interpretation of RCW 61.24.030(2) was correct, it would be possible to preclude a borrower from claiming property was agricultural land even though the property *was* agricultural land. Why? Because even though the property was agricultural land, the agricultural land provision in the DOT would prevent the borrower from asserting the land was agricultural. Accordingly, by alleging that Appellant is precluded by RCW 61.24.030(2) from claiming the property is agricultural land, while making no claim that the property is not agricultural land, Respondents have taken no position concerning Appellant's claim that the property is agricultural

land.[3] They have merely alleged, incorrectly, the law does not permit Appellant to claim the property is agricultural land because of the agricultural land provision in the DOT.

3. Property has never been sold legally.

Pursuant to RCW 61.24.030, it is requisite to a trustee's sale that land which is used primarily for agricultural purposes on both the date the DOT is granted and the date the property is sold must be foreclosed judicially. *RCW 61.24.030(2); Schroeder v. Excelsior Management Grp., LLC,* 177 Wn.2d 94, 106, 297 P.3d 677 (2013); *Brown v. Dept. of Commerce,* 184 Wn.2d 509, 519, 359 P.3d 771 (2015); *Gardner v. First Heritage Bank,* 175 Wn. App. 650, 669-670 (2013). Thus, the sale of such land non-judicially is not a sale under the DTA. Under the DTA, such a sale is void, even if the trustee claims to have faithfully fulfilled all the DTA's requirements. *Schroeder,* 177 Wn.2d at 106-107.

Moreover, an attempt – lawful or unlawful -- to foreclose on property non-judicially, *is certainly not* an attempt to foreclose judicially. Thus, there has been no attempt to foreclose judicially to this day, and because Appellant's property was agricultural land the attempt to foreclose non-judicially was void. That is, the non-judicial attempt has no legal force or effect. *See* BLACK'S LAW DICTIONARY 1411 (5th ed.

[3] Respondents do claim that the trial court, in a footnote in the order denying Appellant's motion to rescind the trustee's sale, ruled the property is not agricultural land. *Reply,* at 9-10. As explained in Section E of this brief, *infra*, the court's musings in the footnote are not a ruling; they are obiter dictum and therefore have no precedential effect. Moreover, they are unsupported obiter dictum – an expression of the judge's personal prejudice as opposed to a legal requirement. The law does not require a vineyard to have a completed irrigation system to be legally designated a vineyard.

1979). In the absence of any legal sale, judicial or non-judicial, Appellant is still the rightful owner of the property.

The Washington Supreme Court ("Court") analyzed RCW 61.24.030(2) in *Schroeder*. Paragraph 21 of the DOT at issue in *Schroeder* contained substantially the same language as paragraph 21 of the DOT at issue in this case. *Schroeder,* 177 Wn.2d at 106. Excelsior, the defendant in *Schroeder,* made the same claim concerning the meaning of the language in paragraph 21 that Respondents are making in this case. *Id.*

Additionally, Excelsior made a claim concerning the borrower's lack of right to claim the land was agricultural that Respondents herein do not make. Schroeder, in addition to executing the DOT, had settled a lawsuit related to Excelsior's initial attempt to foreclose the property non-judicially. The settlement agreement contained a provision that explicitly waived Schroeder's right to insist on judicial foreclosure of the property in the event of a future foreclosure attempt. Said differently, Excelsior claimed, truthfully, Schroeder had, for a valuable consideration,[4] knowingly and voluntary waived all rights to claim the property was agricultural land.

Respondents herein can make no such claim. Therefore, the bank in *Schroeder* had a stronger claim than Respondents herein have that the borrower was not entitled to claim the property was agricultural land. Nevertheless, consistent with the unambiguous language of the statute, the

[4] Schroeder received a refinance of the property in the amount of $425,000 as part of the settlement.

Court found that land which is used primarily for agricultural purposes may not be foreclosed without judicial supervision. *Id.,* at 105. A borrower is not free, the *Schroeder* court proclaimed, to waive the requirements of RCW 61.24.030 by contract. *Id.,* at 107.

C. Appellant did not waive the issue by not raising it until the second unlawful detainer proceeding.

Respondents' contend Appellant is prohibited from claiming the property is agricultural land because he executed a DOT that includes a statement that the land is not used primarily as agricultural land. As a consequence of this contention, rather than the res judicata argument Respondents intend to advance in the Reply, Respondents' argument is a *waiver* argument.

Waiver does not apply in this case.

Waiver is the voluntary relinquishment of a known right. *Id.,* at 106. Key to the concept is that the existence of the right must be known by the person who waives it. *Bowman v. Webster,* 44 Wn.2d 667, 670 (1954). Appellant herein was not aware of the requirements of RCW 61.24.030(2) until long after the unlawful sale occurred. And even if Appellant had been aware of the requirements, his awareness would not have made a difference because the items listed in RCW 61.24.030(2) do not create rights in Appellant.

While the waiver doctrine generally applies to all rights to which a person is legally entitled (*Schroeder,* 177 Wn.2d at 106), it does not apply to RCW 61.24.030. RCW 61.24.030 is not a *rights-creating* statute. *Id.*

Instead, it establishes a list of requirements for a lawful trustee's sale. The requirements on the list are not rights held by the borrower; they are limitations on the trustee's power to conduct a lawful trustee's sale. *Id.,* at 107. Because the requirements are not rights of the borrower, but are instead limitations on the trustee's power to conduct a foreclosure without judicial supervision, the requirements cannot be waived by the borrower. *Id.*

D. Res Judicata does not apply to this case.

"In Washington res judicata applies when a prior judgment has a concurrence of identity in four respects with a subsequent action. *Id.,* at 108. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Mellor v. Chamberlin,* 100 Wn.2d 643, 645-46, 673 P.2d 610 (1983) (citing *Seattle First National Bank v. Kawachi,* 91 Wn.2d 223, 588 P.2d 725 (1978). This court does not have to evaluate any one of the four elements because it is undisputed that there is *no prior judgment* regarding the propriety or impropriety of foreclosing on Appellant's land non-judicially.

The trial court acknowledged as much in its ruling.

> Not only was this issue [the issue of whether the land could lawfully be foreclosed non-judicially] *not raised within an action to contest the foreclosure*, but it was also *not previously raised in connection with the unlawful detainer action* . . . . Mr. Choquer is precluded from raising the issue as a defense to the unlawful detainer action at this time.

CP, at 25.

Of course, the quote indicates the court is advancing a waiver theory, but it also reveals Appellant brought no action regarding the impropriety of the June 2015 sale prior to the second unlawful detainer proceeding. There was no action to stop the 2015 foreclosure – and no claim in the initial unlawful detainer action -- because Appellant did not learn that such an action was possible until long after the initial unlawful detainer action had concluded.

Appellant learned of the impropriety of the 2015 sale in late 2016 while the initial unlawful detainer action was on appeal to this court. Appellant immediately moved in this court for an order invalidating the sale. The court refused to hear that motion because the issue had not been raised in the lower court.

Upon returning to the lower court, Appellant raised the issue for the first time. It was error for the court to refuse to hear the issue because the violation of RCW 61.24.030(2) -- a violation which takes a sale of agricultural land outside the DTA -- can be raised at any time.

> Nothing can be founded upon an act or transaction that is absolutely void, but, from such as are merely voidable, good titles may spring. And every stranger may take advantage of a void act, but not so of a voidable one."
>
> A voidable sale passes the legal title subject to be avoided by a direct proceeding for that purpose, and it is not subject to a collateral attack. It may be ratified. But a void sale conveys no title, is incapable of ratification, and may be shown to be a nullity even in a collateral proceeding.

Murray v. Briggs, 29 Wash. 245, 257, 69 P. 765 (1902) (quoting 28 Am. & Eng. Enc. Law 474 (1895).

Appellant's property is agricultural land. Therefore, the non-judicial foreclosure of the property in June 2015 was void. It conveyed no title and is incapable of ratification by the passage of time, or anything else. It is a nullity. As such, Appellant had the right to show the 2015 sale to be a nullity, even in the second unlawful detainer action.[5] The trial court's refusal to allow Appellant the right to raise the issue was reversible error.

E. Trial court did not rule property was not agricultural land.

Respondents correctly proclaim that the court precluded Appellant from raising the .030(2) issue as a defense because the issue was not raised in an action prior to the sale, and was not raised in the initial unlawful detainer action. *Reply,* at 9. Respondents, however, also *inaccurately* insist that the lower court ruled there was an absence of primary agricultural use of the property. *Id.* On this subject – the subject of whether there was an absence of primary agricultural use of the property -- in a footnote, the lower court stated the following:

> Even ***if*** Mr. Choquer was not precluded from raising the issue as a defense at this time, it appears based on the information contained in the Defendants' Declarations that while Mr. Choquer may have intended to develop a vineyard on the subject property, the necessary irrigation system was never completed and wine production never occurred. Based on the uncontested applicability of RCW 59.12, the presence of a primary residence on the subject property that has allegedly even been improved by Mr. Choquer, and the absence of a primary agricultural use of the subject property, the property *would not* meet the RCW

[5] Issues of ownership of property normally are not discussed in unlawful detainer actions, the nature of the action being to determine the *right to possession* of the property in most such actions.

> 61.24 definition of being primarily used for agricultural purposes.

CP, at 25.

The footnote is in the conditional: "*if* Mr. Choquer was not precluded from raising the issue as a defense at this time . . . . the property *would not* meet the RCW 61.24 definition of being primarily used for agricultural purposes." But the court *did preclude* Mr. Choquer from raising the issue as a defense at the time. Hence, the court's observation that the necessary irrigation system and wine production never occurred was *obiter dictum*.[6]

The principal feature of *holdings* is that holdings are necessary to decide a case, but the principal feature of *obiter dictum* is that it is not necessary to decide a case. Shawn J. Bayern, *Case Interpretation*, 36 Fla. St. U. L. Rev. 125, 129 (2009); and *Pierce County v. State*, 150 Wn.2d 422, 435 n.8, 78 P.3d 640 (2003) (quoting BLACK'S LAW DICTIONARY 1100 (7th ed. 1999).

The court decided Appellant's RCW 61.24.030(2) violation claim by *refusing to consider the merits of the claim*. The undeniable result of that refusal is that the court's observations regarding the merits of the claim, though interesting, were not necessary to its decision of the claim.

[6] In addition, the court's claim is simply inaccurate. In his declaration, Appellant indicates, among other things, he began planting his first grafted grapevines on the property in 2009, and had more than 8000 grape vines in production on the property on the date of the trustee's sale. A true and correct copy of Appellant's declaration is attached hereto as **Exhibit 2** and is incorporated herein by this reference.

By definition, they could not have been. The footnote is *obiter dictum*. *State ex rel. Lemon v. Langlie,* 45 Wn.2d 82, 89, 273 P.2d 464 (1954).

F. Open Space Taxation Agreement provided by Appellant proves property is agricultural land.

Respondents declare "[r]eview of the Open Taxation Agreement provided by Appellant clearly shows the Agreement relates to Open Space and not Farm and Agricultural Conservation land." *Reply*, at 11. They cite RCW 84.34.020(1)(a), (b), and (c) as authority for their declaration.

The declaration represents the second time in an 11-page document that Respondents present information to the court that is at best misleading, and at worst a concerted effort to deceive the court. A true and correct copy of the Open Taxation Agreement is attached hereto as **Exhibit 1** and is incorporated herein by this reference as though fully set forth.[7]

RCW 84.34.020(1)(a), (b), and (c) are subparts of the same statutory provision. Those subparts – (a), (b), and (c) – are not in competition with one another, they work together. RCW 84.34.020(1) defines the term "Open Space Land." Each of the subparts defines a different way in which land may be deemed to be open space land. Subpart (c) defines Open Space Land as "any land meeting the definition of farm and agricultural land under subsection 8 of this subsection." So,

[7] Respondents claim Appellant is not entitled to use the Agreement because it was not part of the record from the Superior Court. Even if that is true, Respondents have given the court the right to consider the document by making it a a substantial part of their Reply. Appellant desires that the court consider the Agreement.

the fact that the Open Taxation Agreement is entitled "Open Space" in no way detracts from the fact the property is agricultural land. Indeed, paragraph 8 of the Open Taxation Agreement contains the following language:

> The county assessor may require classified landowners to submit pertinent data regarding the use of the land, *productivity of typical crops*, and such similar information pertinent to continued classification and appraisal of the land.

If designation as *Open Space* was somehow inconsistent with designation as agricultural land, the italicized and underlined portion of the above quote would not appear in the Agreement.

G. Respondents not entitled to attorney fees and costs.

Appellant incorporates by reference all the allegations and arguments contained in Sections A through F herein above. Based upon those allegations and arguments, Respondents should be denied attorney fees and costs.

II CONCLUSION

For the reasons listed herein above, the court should return this matter to the trial court with instructions to: (1) rescind the order granting the writ of restitution; (2) return Appellant's cash bond to Appellant; (3) invalidate the June 5, 2015 non-judicial foreclosure of the Property; and (4) return title to and possession of the Property to Appellant.

Dated this 14th of July, 2017.

Respectfully submitted,

JOHN CHOQUER

__/S/ John Choquer_____
John Choquer, Appellant Pro se

IN AND FOR THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

JOHN CHOQUER,

Appellant,

vs.

GUY WAY AND ZENAIDA WAY,

Husband and Wife, ,

Respondents.

Appellate Ct. Case No.: **49844-8-II**

DECLARATION OF DELIVERY OF APPELLANT'S REPLY BRIEF

I, John Choquer, declare as follows:

On July 14, 2017, I caused to be delivered to counsel for Plaintiffs, Quinn H. Posner, a copy of Appellant's Reply Brief , and a copy of this Declaration of Delivery, prior to filing these documents in the Washington Court of Appeals, Division II.

DATED this 14th day of July, 2017, at La Center, Washington.

Respectfully submitted,

JOHN CHOQUER

____/S/ John Choquer_____

John Choquer, Plaintiff Pro se

FILE NO. 80-0150 OPEN SPACE TAXATION AGREEMENT

Prepare in triplicate with one completed copy to each of the following: Applicant, Legislative Body, County Assessor

(To be used for "Open Space or "Timber Land" Classification, only)

8006270075

This Agreement between JAMES J. KILDUN

31209 NE Mason Creek Road, Battle Ground, WA. 98604 hereinafter called the "owner, and

(granting authority) CLARK COUNTY

Whereas the owner of the following described real property having made application for classification of that property under the provisions of RCW 84.34.

And whereas, both the owner and legislative authority desire to limit the use of said property, recognizing that such land has substantial public value as open space and that the preservation of such land constitutes an important physical, social, esthetic and economic asset to the public, and both parties agree that the classification of the property during the life of this Agreement shall be for:

OPEN SPACE
(Open Space and Timber Land)

Now, therefore, the parties, in consideration of the mutual covenants and conditions set forth herein, do agree as follows:

(1) During the term of this Agreement, the land shall only be used in accordance with the preservation of its classified use.

(2) No structures shall be erected upon such land except those directly related to, and compatible with the classified use of the land.

(3) This Agreement shall be effective commencing on the date the legislative body receives the signed Agreement from the property owner, and shall remain in effect for a period of at least ten (10) years.

(4) This Agreement shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto.

(5) Withdrawal: The land owner may withdraw from this Agreement if after a period of eight years the land owner makes a withdrawal request, which request is irrevocable, to the assessor. Two years from the date of that request the assessor shall withdraw the land from the classification, and the applicable taxes and interest shall be imposed as provided in RCW 84.34.070.

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(6) Breach: After land has been classified and an Agreement executed, any change of the use of the land, except through compliance with items (5) or (7) of this Agreement, shall be considered a breach of this Agreement, and subject to applicable taxes, penalties and interest as provided in Sections 9 and 12 Chapter 212 Laws of 1973 1st Ex. Sess.

(7) A breach of Agreement shall not occur and the additional tax shall not be imposed if the removal of designation resulted solely from:

(a) Transfer to a government entity in exchange for other land located within the state of Washington;
(b) A taking through the exercise of the power of eminent domain, or sale or transfer to an entity having the power of eminent domain in anticipation of the exercise of such power;
(c) Sale or transfer of land within two years after the death of the owner of at least fifty percent interest in such land.
(d) A natural disaster such as a flood, windstorm, earthquake, or other such calamity rather than by virtue of the act of the landowner changing the use of such property.

Department of Revenue PTF 81 (9/73)

(e) Official action by an agency of the state of Washington or by the county or city within which the land is located which disallows the present use of such land.

(f) Transfer to a church and such land would qualify for property tax exemption pursuant to RCW 84.36.020.

(8) The county assessor may require classified land owners to submit pertinent data regarding the use of the land, productivity of typical crops, and such similar information pertinent to continued classification and appraisal of the land.

Legal Description of Classified Land:

Portion of Serial No. 222975, Tax Lot 16 of Section 9, Township 4 North, Range 2 East Willamette Meridian. 8.80 acres.

This Agreement shall be subject to the following conditions:

CLARK COUNTY CODE, Chapter 3.08

Section 7. "Soil Conservation". At least eighty (80%) percent of the tract must be in production of food or fiber.

Section 10. "Weed Control". An effective noxious weed control program must be maintained/implemented on this "open space" tract.

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It is declared that this Agreement contains the classification and conditions as provided for in RCW 84.34 and the conditions imposed by this Granting Authority.

Dated _____

RECORD
CLARK CO. WASH.
Assessor
JUN 27 11 22 AM '80
AUDITOR
RON DOTZAUER

Granting Authority: Clark County

By _____

By _____

By _____

As owner(s) of the herein described land I (we) indicate by my (our) signature(s) that I (we) are aware of the potential tax liability and hereby accept the classification and conditions of this Agreement.

Dated 5/5/80

_____
Owner(s)

_____
(Must be signed by all Owners)

BROOKE OWEN
NOTARY PUBLIC
STATE OF WASHINGTON

Subscribed and sworn to before me this 5 **day of** May, 1980

_____
Notary Public

Date signed Agreement received by Legislative Authority _____

RECEIVED
MAY 07 1980
Commissioners' Dept.

I, GREG A. KIMSEY, Auditor of Clark County, State of Washington, do hereby certify that the foregoing is a true and correct copy of a:

open space approval

File No. 5006270075 of record in this office.

WITNESS my hand and official seal.

This 10 day of May, 2017 A.D.

GREG A. KIMSEY, Auditor, Clark County

By _____ Deputy

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JOHN CHOQUER, a married man, as his sole and separate property, Appellant, vs. GUY and ZENAIDA WAY, husband and wife, Respondents.	)	Superior Ct. Case No.: 16-2-00274-2 **Appellate Court Case No.:** **48191-0-II** **DECLARATION IN SUPPORT OF EMERGENCY MOTION TO RESCIND WRIT OF RESTITUTION**

I, John Choquer, declare as follows:

1. I am Defendant/Appellant ("Appellant") in the above-referenced litigation.

2. Prior to the trustee's sale of the property located at 9213 NE Mason Creek Rd, Battle Ground, WA 98604 ("Property")—the Property which is the subject of this appeal--on June 5, 2015, Appellant was the owner of the Property.

3. Appellant purchased the Property for $350,000 in April 2004 with the intent of farming the land while simultaneously preparing it for the development of a vineyard and winery.

4. To pay the purchase price, the undersigned executed two promissory notes and secured each promissory note with a deed of trust ("DOT"). The first promissory note was in the amount of $245,000 and the second was for $104,000.

5. The Property has a fair market value today of approximately $600,000.

6. Between 2004 and 2012, Defendant/Appellant paid down the first mortgage to approximately $200,000, and, by doubling and tripling monthly payments, paid down the second mortgage to approximately $20,000.

7. From 2013 through 2015, a period of time during which I experienced sustained financial difficulty, I missed several first and second mortgage monthly mortgage payments.

8. The first mortgage holder chose to work with me, and today I remain obligated on the $200,000 first mortgage, and the first mortgage is in current status.

9. Despite my best efforts to arrange a modification, and despite the years of sweat and effort I had put into the improvement of the Property, the second mortgage holder chose to foreclose the $20,000 second mortgage.

10. Defendant/Appellant's ownership interest in the Property was sold at public auction for $25,570 on June 5, 2015.

11. Plaintiff/Respondents, Guy and Venaida Way, were the successful bidders at the trustee's sale.

12. The Property is agricultural land and has been used totally for agricultural purposes since long before I purchased the Property in April 2004.

13. Prior to my purchase of the Property, it had been used for farming and grazing purposes for decades.

14. The person who sold the Property to me, Mrs. Doris Kildune, had farmed the Property for 29 years prior to selling the Property to me.

15. During most, if not all, of that 29-year period, the Property was in "Farm Deferral" status. Such status permits the property owner to defer the

payment of property taxes until the property is sold, thereby easing the financial burden on small family farmers and benefiting society as a whole.

16. Before Mrs. Kildune, the person who sold the Property to me, purchased the Property, the Property was the longtime site of the Andersen Dairy Farm. Andersen Dairy is a large dairy/creamery in downtown Battleground, Washington.

17. Appellant has always used the Property for agricultural purposes.

18. For several years after purchasing the Property, I sold the hay from approximately 8 acres of the Property to a neighbor, Mr. Canham, who lives up the road from the Property.

19. Mr Canham paid me for the hay by allowing me unlimited use of a tractor he owned. I used the tractor to clear the land in preparation for construction of the vineyard.

20. Also, there are 42 apple trees on the Property. From the date I purchased the Property, I intended to produce, and began the prep work for production of, apple cider for sale. The production of cider goes back to the early 1900's in my family.

21. It takes several years to produce cider. The first few years the trees must be pruned and cultured in preparation for the production of apple cider.

22. I produced my first cider in the fall of 2007. Currently I have 90 gallons of cider from the 2009 vintage that will be turned into a fortified wine.

23. After years of prep work, in 2009 I began planting the grapevines.

24. That year I planted seven acres of grapes. The plants are productive to this day. All of the vines are grafted plants. In addition to planting the grafted plants, I installed a trellis system and installed irrigation tubing.

25. The total value added to the Property as a result of adding the vineyard, the trellis system, the irrigations tubing, and the retaining walls is about $300,000.

26. I have done considerable additional work on the Property to create the vineyard that exists on the Property today. I have shaped the land for drainage and groomed the slope to most efficiently accommodate the drainage system.

27. I have also constructed 3 bio-swale ponds. I obtained a permit from Clark County for the construction of each of these ponds.

28. The bio-swale project caused the county to change the County Code to make better provisions for agricultural use of ponds to incorporate organic and bio-dynamic approaches to farming.

29. Since I installed the vineyard we have also added Lavender production and have sold lavender to several clients.

30. We continue to farm the vines and lavender and expect to have a grape production this year to be made into wine and to be sold to Vinesynergy, LLC.

31. I learned only within the past five days that agricultural land may not be foreclosed non-judicially. My land was foreclosed non-judicially.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of September, 2016, at Battle Ground, Washington.

Respectfully submitted,

_____

John Choquer, Defendant/Appellant

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July 18, 2017 - 4:28 PM

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Appellate Court Case Number:	49844-8
Appellate Court Case Title:	Guy Way & Zenaida Way, Respondents v. John Choquer, et al, Appellant
Superior Court Case Number:	15-2-02454-3

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